IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

STATE OF OKLAHOMA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**Case No. 05-cv-329-GKF(PJC)**
	)	
TYSON FOODS, INC., et al.,	)	
	)	
Defendants.	)	

STATE OF OKLAHOMA'S RESPONSE IN OPPOSITION TO DEFENDANT PETERSON FARMS, INC.'S MOTION IN LIMINE SEEKING TO EXCLUDE EVIDENCE PURSUANT TO, *INTER ALIA*, FEDERAL RULE OF EVIDENCE 403 - Dkt No. [2397]

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COMES NOW Plaintiff the State of Oklahoma ("State") and for its response in opposition to Peterson Farms, Inc.'s ("Peterson") Motion in Limine Seeking to Exclude Evidence Pursuant to, *Inter Alia,* Federal Rule of Evidence 403 (Dkt No. [2397]), respectfully submits that the Motion should be denied for the reasons stated herein.

I. INTRODUCTION

A motion in limine is a procedural device to obtain a ruling in advance of trial on the relevance of or unfair prejudicial effect of certain prospective evidence. Roda Drilling Company v. Siegal, 2009 WL 1926269, *1 (N.D. Okla. 2009). Motions in limine are appropriately granted only when the evidence is plainly inadmissible on all potential grounds. Id.

It appears that only the Cargill Defendants (collectively "Cargill") have filed a Joinder in Motion at Dkt. No. [2445]. As such, to the extent Peterson's Motion seeks to exclude evidence relating to any other Defendant, said Motion should be wholly denied. To the extent that Cargill has joined in portions of the Motion but has failed to advance any factual evidence relative to or in support of Cargill's Joinder, Cargill's Motion should be denied in its entirety, if not dismissed.

II. REFERENCES TO "PETERSON'S OPERATIONS" ARE PERMISSIBLE

Peterson seeks to exclude the amorphous category of what it terms "general references" to Defendants' or Peterson's operations within the IRW. Initially, Peterson's Motion is not a joint Motion nor have all Defendants joined in Peterson's Motion. As stated above, only Cargill has filed a Joinder in this Motion and it has not specifically joined in Section I.

Peterson complains that the terminology "Peterson's operations" is not competent and would either confuse or mislead the trier of fact if allowed as it claims it does not now, nor has it ever, owned or operated any poultry feeding or processing operation within the IRW. Peterson

has, however, contracted with growers to raise Peterson's birds in the IRW for decades. Additionally, contrary to statements by Peterson, other Defendants admittedly do own poultry operations in the IRW. Cargill owns breeder farms in the IRW. *See* Ex. A (Alsup 30(b)(6) Vol. I at 68-69). George's owns and manages growing facilities in the IRW. *See* Ex. A (McClure 30(b)(6) at 52, 128-129). Simmons manages investor farms owned by partnerships comprised of some of its officers and employees *See* Ex. A (Murphy 30(b)(6) at 100-102). Cal-Maine recently reentered the IRW and owns the former George's commercial egg grower operations through a wholly owned subsidiary Benton County Foods, LLC. *See* Ex. A (Storm Vol 1. at 96-98, Vol II at 224-225).

The State presents in its Response in Opposition to Defendants' Motion in Limine to Exclude References to Trade Organizations, Organizational Documents, *etc.* [Dkt. No. 2430] arguments and authorities to establish knowledge of and control by Peterson and the other Defendants over their contract growers which render the employer liable for the acts of the contractor. The arguments and authorities included therein are adopted herein as if fully set forth. Considering the facts, arguments and authorities presented, reference to Peterson's operations in the IRW is probative, is based in fact, and will neither confuse nor mislead the trier of fact.

Peterson goes so far as to argue that such statements are impermissible legal opinion in violation of Fed. R. Evid. 704. Federal Rule of Evidence 704, and the authorities cited by Peterson, support the proposition that an expert witness may not offer an opinion embodying a legal conclusion. What Peterson seeks to exclude, however, are not legal conclusions by expert witnesses, but all references to the general phrase "Peterson's operations." Statements of counsel are not testimony. To the extent that Peterson seeks to limit references made by counsel,

Fed. R. Evid. 704 is inapplicable. Peterson can not prevent counsel from arguing its theory of the case. Peterson's Motion should be denied.

III. J. BERTON FISHER'S "HISTORY" OF PETERSON IS PERMISSIBLE UNDER FED. R. EVID. 803(18)

Peterson seeks to preclude the State's expert, Bert Fisher, from testifying regarding the history of Peterson alleging such testimony is either hearsay or more prejudicial than probative. Fisher's expert report includes summaries of the history of each of the Defendants. Fisher learned the Peterson history from his review of a book entitled *Lloyd Peterson and Peterson Industries: An American Story*, authored by the owner and founder of Peterson.

An exception to the hearsay rule for treatises relied on by expert witnesses exists at Fed. R. Evid. 803(18) which provides:

> **(18) Learned Treatises.** To the extent called to the attention of an expert witness upon cross-examination or relied upon by the expert witness in direct examination, statements contained in published treatises, periodicals, or pamphlets on a subject of history, medicine, or other science or art, established as a reliable authority by the testimony or admission of the witness or by other expert testimony or by judicial notice. If admitted, the statements may be read into evidence but may not be received as exhibits.

The publication is on a subject of history, written by the owner and founder of Peterson. In its Motion, Peterson does not claim that the book is factually inaccurate or non-authoritative, or that the history stated therein is in anyway wrong, confusing or misleading. One of the areas in which Fisher opines is as to the number of birds grown over time in the IRW, including those grown by Peterson. The history of Peterson is important in establishing the length of time the business was in operation in the IRW, the location of the operations and the size and growth of the operations overtime.

Fisher should be allowed to testify as to the Peterson history taken directly from a book

written by the owner and founder of Peterson.

IV. PETERSON'S REQUEST FOR LIMITATION REGARDING COLLECTIVE REFERENCES TO GROWER CONTRACTS SHOULD BE DENIED

Peterson seeks to exclude collective references to Defendants' contracts under Fed. R. Evid. 403 and 601. Peterson claims the contracts of the respective Defendants, particularly Peterson, are unique and diverse. Mainly, Peterson claims that its contracts provide that the poultry waste is owned by the grower and that the grower is responsible for providing bedding material in its poultry house.

In almost all respects, however, there is little substantive difference in the contracts pertaining to the issues in this case. *See* Ex. B (Expert Report of Dr. Taylor at ¶¶ 8, 9, 15, 22, 30, 31, 44, 45). It is undisputed the Defendants' contracts are all alike in substance on each of these facts:

1) Each Defendant owns the birds grown in the IRW;

2) Each Defendant supplies and requires its growers to only use the Integrator feed, medicine, veterinary services to grow the birds;

3) Each Defendant provides a flock supervisor for its growers;

4) Each Defendant chooses the type and number of birds to be produced in the IRW;

5) Each Defendant chooses when to place and pick up the birds;

6) Each Defendant requires the grower to dispose of the bird mortality and waste produced by the Defendant's birds;

7) Each Defendant's contract terms are non-negotiable and presented to growers on a "take it or leave it" basis.

Peterson's, and indeed all of the Defendants', contracts with their growers are adhesion contracts. An adhesion contract is "a standardized contract prepared entirely by one party to the

transaction for the acceptance of the other." In re Shirel, 251 B.R. 157, 160 (W.D. Okla. 2000); M.J.Lee Construction Company v. Oklahoma Transportation Authority, 125 P.3d 1205, 1211 n.9 (Okla. 2005). Adhesion contracts, because of the disparity in bargaining power between the draftsman and the second party, must be accepted or rejected on a "take it or leave it" basis without opportunity for bargaining. Shirel, 251 B.R. at 160. *See* Ex. A (Peterson 30(b)(6) Deposition, Ray Wear testimony, taken July 26, 2007, at 34-39, 56-57). Under Oklahoma law, adhesion contracts are interpreted most strongly against the party preparing the form. Shirel, 251 B.R. at 160.

Addressing Peterson's argument of uniqueness, beginning in 1999, a clause was inserted into its (non-negotiable) contract that purports to transfer to the grower the poultry litter and the economic benefits from the use and disposal of that litter "to the extent they exist." A short history of the contract language change is set forth in section VIII *infra.* No other Integrator Defendant contract contains similar language. Despite this alleged unique provision, it is undisputed that historically the poultry waste generated by the Peterson's birds at the contract grower facilities has been handled, stored, and disposed of by the grower. *See* Ex. A (Peterson 30(b)(6) Deposition, Kirk Houtchens testimony, taken July 26, 2007 at pp. 76-77); Ex. A (Deposition of Dan Henderson taken June 5, 2008 at pp. 22-23).

A contract that was used by Peterson in 1997 did not have the unique language purporting to transfer the waste to the grower. (Contract at PFIRW-007046, filed under seal and labeled as Exhibit "C"). Clearly prior to 1999 Peterson's contractual status with its growers regarding waste disposal was the same as the other Defendants. Thus any collective reference to the Defendants' contracts would be accurate for anytime prior to March 1999.

Interestingly, the transfer language added in 1999 by Peterson creates an admission that Peterson itself owned the waste prior to the contract change and could convey the waste. If Peterson did not own the waste it could not transfer it. This admission eliminates argument about ownership of and any liability for its handling, storage and disposition prior to that change. Peterson by its own admission should be held liable to the State for its waste disposal practices occurring prior to 1999.

Peterson argues its growers "valued their litter" however, the waste is also recognized by Peterson's environmental affairs director as a liability. *See* Ex. A (Deposition of Ronald Mullikin taken November 14, 2007 at 97). The State's expert Robert Taylor opines that the poultry waste in the IRW has no value because of excess phosphorus in the soil. *See* Ex. B (Taylor Expert Report at ¶¶ 63, 68-70). Further evidence of its lack of value is revealed in a Peterson survey of its growers. Peterson learned from the survey that fifty-four percent (54%) of its growers would give away the litter if someone would remove it from their farms. *See* Ex. A (Deposition of Kerry Kinyon taken June 4, 2008 at 132-133). Peterson has also investigated alternative uses (to land applying) for the poultry waste and even published an ad by way of a letter to Citizens of Oklahoma in the *Tulsa World* stating that the Integrators would implement other alternatives for litter management virtually undermining Peterson's arguments of the value its growers place on the waste and establishing the Defendants' control of the waste. *See* Ex. A (Kinyon Depo at 33-34); *See* Ex. A (Mullikin Depo at 17, 24, 57-58); *See* Ex. A (Houtchens Depo at 84).

Peterson and the other Defendants in the same *Tulsa World* Letter to Citizens of Oklahoma state they will reduce the amount of poultry litter applied within the watershed by

transporting more than 200,000 tons to other areas. Peterson does not have its own growing operations in the IRW thus, in order to remove the waste to reduce the amount of litter applied in the IRW, they will need to exercise control over their contract growers. Similarly Peterson has, in 2001, exercised such control over it growers. The court can take judicial notice that Peterson was a party to the *City of Tulsa* litigation. In that case the defendants, including Peterson, committed to strict restrictions on the land application of poultry waste and did so without first obtaining the consent of its growers who, according to contract with Peterson, purportedly owned and controlled the waste. When it serves its purpose to have control of the waste Peterson clearly exercises that control. Before and after 1999 the collective reference to the pertinent portions of the Defendants' contracts, as listed above, is clearly accurate and should be allowed. Any fear Peterson has of confusing the jury could most certainly be addressed by effective cross-examination. Peterson's Motion on this issue should be denied.

V. DEFENDANTS ARE JOINTLY AND SEVERALLY LIABLE FOR THE INDIVISIBLE INJURY TO THE IRW

Peterson asks the Court to exclude use of "statements, testimony or evidence pertaining to other, separate Defendants against Peterson." In doing so, Peterson essentially asks the Court to ignore the theories of joint and several liability, indivisible injury, and concurrent tortfeasors, all of which are present in this case and which have been extensively briefed in the State's Response in Opposition to Defendants' Joint Motion for Partial Summary Judgment (Dkt. No. 2182). Moreover, Peterson wholly ignores that, as stated in that brief, *see* Dkt. No. 2182 p.21 n.11, the State has presented substantial evidence that *each* of the Defendants has contributed to the contamination of the IRW. Additionally, the State incorporates herein by reference as if fully set forth its Response in Opposition to Defendants' Dkt No. 2399 Motion in Limine to Preclude

Generalized References to Defendants on Issues Requiring Defendant-Specific Proof filed contemporaneously herewith at [2476].

The State has gathered and presented: (1) evidence of the volumes of waste generated annually by ***each*** Defendant; (2) evidence as to the number and location of active poultry houses for ***each*** Defendant; (3) evidence that the vast majority of poultry waste from Defendants' birds is land applied in close proximity to the houses where it is generated; 4) available soil test data for ***each*** Defendant showing widespread disposal of poultry waste within the watershed; (5) evidence that poultry waste is the number one source of phosphorus loading in the IRW; (6) scientific evidence showing that some portion of land-applied poultry waste is always transported from fields to the water; (7) evidence as to the geology of the IRW establishing ready pathways for the transport of poultry waste and its constituents to surface and groundwater; and (8) modeling evidence showing that approximately 59% of the phosphorus load ultimately reaching Lake Tenkiller is from land-applied poultry waste. *See* Dkt. No. 2182 (Stat. of Disp. Facts ¶¶ 13-15). This causation evidence is more than adequate under Oklahoma's indivisible injury doctrine for the purposes of defeating Peterson's Motion.

Defendants have made it clear they have a joint defense agreement as evidenced by numerous pleadings and statements made in this case. The opening statement for Defendants by Patrick Ryan at the hearing on the State's Motion for Preliminary Injunction (which Defendants have moved to strike and which is also the subject of a combined Defendants' Motion in Limine) was not designated as being made on behalf of Tyson only. No other member of the defense counsel spoke in opening or waived opening statements on the record or objected to Mr. Ryan's statement at the time it was made. There is no doubt that an attorney's statements may be

allowed as an admission against interest of his client when they are directly related to the management of litigation. Hanson v. Waller, 888 F.2d 806, 814 (11th Cir. 1989). (*See also* State's response to Dkt No. 2392).

Regarding the "example" set forth by Peterson of the Peterson contract and transfer of ownership of poultry waste to the growers, Peterson misrepresents the State's statement by omitting a significant qualifier.[1] What the State actually said in the referenced motion is: "Defendants' contracts with their growers, with the exception of Defendant Peterson's contracts since 1999, do not transfer ownership of the poultry waste to the growers." *See* Dkt. No. 2062 (State's Motion for Partial Summary Judgment at p.12, ¶14). Contrary to the Defendants' presentation, the State did differentiate between the Defendants' contracts, following the change by Peterson in 1999. To the extent, however, that practices of Defendants are the same or similar, as established by the facts, collective reference should not be limited. Any worry Peterson may have can be addressed by effective cross-examination or in direct examination in Defendants' case in chief. Peterson's Motion on this issue should be denied in its entirety.

VI. REFERENCES TO DEFENDANTS' OR PETERSON'S KNOWLEDGE AND REFERENCE TO INDUSTRY GROUPS IS RELEVANT AND ADMISSIBLE

Peterson seeks to exclude "general references" to Defendants' or Peterson's "purported" knowledge of environmental issues claiming that the State must prove actual knowledge by Peterson and any other Defendant. As previously stated, only the Cargill Defendants have joined in Peterson's Motion. However, Cargill has failed to allege any facts specific to Cargill in

[1] As to the example Peterson cites on p.7 claiming that the State has offered hearsay statements of former Peterson employees against all Defendants, the paragraph referenced deals specifically with Peterson. Additionally, the State incorporates herein the arguments set forth in the State's Response in Opposition to Defendants' Dkt. No. [2395] Motion in Limine.

support of its Joinder, therefore, Cargill's Motion should be denied. To the extent Peterson's Motion seeks to exclude evidence on behalf of any other Defendant, it should be wholly disregarded.

There can be no argument against the principle that a corporation is an artificial legal entity. The knowledge a corporation has is the knowledge which is imputed to it under principles of agency law. Operators Royalty & Producing Co. v. Greene, 49 P.2d 499, 502 (Okla. 1935); Campen v. Executive House Hotel, Inc., 434 N.E.2d 511, 517 (Ill. App. 1st 1982).

> A corporation can acquire knowledge only through its officers and agents, the general rule being that a corporation is affected with constructive knowledge, regardless of its actual knowledge, of all material facts of which its officer or agent receives notice or acquires knowledge while acting in the course of his employment and within the scope of his authority, and the corporation is charged with such knowledge even though the officer or agent does not in fact communicate his knowledge to the corporation.

Operators Royalty, 49 P.2d at 502. "Once an agent's knowledge is imputed to a corporation, the imputed knowledge is not affected by changes in the corporation's personnel." Campen, 434 N.E.2d at 517. Courts considering the question of whether a corporation's knowledge remains imputed to the corporation after the corporation is purchased by new owners who are unaware of the imputed information have answered in the affirmative finding a corporation does retain its imputed knowledge even after a change in ownership. In re Crown Vantage, Inc., 2004 WL 1635543, *5 (N.D. Cal. 2004). "The process of acquisition simply does not sanitize the acquired corporation, notwithstanding that it has gained new owners and fresh management." Id.

The evidence is clear and undisputed that Peterson attended industry wide conferences, workshops and symposia and participated in the membership of various industry wide associations through its employees, agents, and officers. Peterson admits it had one or more

representatives attend conferences, workshops, and symposia such as: Arkansas Governor Clinton's Animal Waste Task Force; Oklahoma Governor Keating's Animal Waste Task Force; Eucha/Spavinaw workgroups; meetings with City of Tulsa's Mayor and Tulsa Metropolitan Utility Authority regarding the City of Tulsa's claims and lawsuit involving the Eucha/Spavinaw pollution case; and, meetings with University of Arkansas representatives involving alternative uses for poultry waste *i.e.* a poultry litter bank. In addition Peterson admits to having membership in, and that various Peterson corporate officers serve as representatives to, National Chicken Council (previously National Broiler Council) and the Poultry Federation (a/k/a Arkansas Poultry Federation). *See* Ex. D, (Supplemental Responses of Defendant, Peterson Farms, Inc. to State of Oklahoma's September 13, 2007 Set of Interrogatories, Interrogatory 8 & 9).

Past employees and officers of Peterson have gone farther in making similar admissions. Peterson's former President, Dan Henderson, was the on the board at the Poultry Federation in the late 1980's or early 1990's and remembers attending a U.S. Poultry and Egg Association meeting. *See* Ex. A (Henderson Depo at 31-32). Ron Mullikin, former Director of Environmental Affairs, indicated he attended meetings of the National Poultry Waste Management Symposium, *See* Ex. A (Mullikin Depo at 20), as well as taking the lead in meetings between the City of Tulsa, various state and federal agencies, and Peterson. *See* Ex. A (Mullikin Depo at 9-10). The matter of poultry waste management also led to further inquiry by Peterson on issues such as other countries efforts in alternative uses. For instance, Ron Mullikin testified that he went to England on behalf of Peterson to study some alternative uses to land applying poultry waste. *See* Ex. A (Mullikin Depo at 24).

This information from such symposia, workshops, and conferences was not only acquired but also shared within the corporation. Dan Henderson stated in his deposition: "We were a small enough company that usually if someone attended, they'd come by and sit down and discuss what they learned." *See* Ex. A (Henderson Depo at 33). The State also incorporates herein the arguments and authorities presented in response to Dkt No. 2430.

The knowledge gained by Peterson's officers, directors, and employees while acting within the scope and authority of their employment is imputed to Peterson. Any objection Peterson may have to a specific piece of evidence, none of which are actually identified and challenged in Peterson's Motion, should be made when the evidence is introduced at trial and not by an amorphous, general objection to an undefined reservoir it terms "purported knowledge," which the State maintains is properly attributable to Peterson.

VII. PETERSON'S MOTION SEEKING EXCLUSION OF REFERENCES TO CONCENTRATED ANIMAL FEEDING OPERATIONS SHOULD BE DENIED

The State incorporates herein by reference its response to the "Defendants' Joint Motion in Limine to Preclude Plaintiffs [sic] from Referring to or Identifying Poultry Operations in the Illinois River Watershed as Concentrated Animal Feeding Operations or 'CAFOs'" Dkt No [2404], filed contemporaneously with this response. While the joint motion of Defendants addressed Fed. R. Evid. 402 & 403 it is still applicable to the Peterson motion.

In addition, it is clear the volume of birds grown in the concentrated area of the IRW is relevant under Rule 401 and has the tendency to make the existence of the creation of hundreds of thousands of tons of poultry waste more probable than it would without the evidence. For the reasons cited in the State's response to Dkt. No. 2404, Peterson's Motion on this issue should be denied.

VIII. TESTIMONY REGARDING PATHOGENS IN LITTER ASSOCIATED WITH PETERSON IS APPROPRIATE AND SHOULD NOT BE LIMITED AT TRIAL

Section VII of Peterson's Motion seeks to exclude reference to pathogens found in waters of the IRW because they have not been traced specifically to former contract growers of Peterson. Peterson is attempting to reargue Defendants Motion for Summary Judgment on Causation, which the Court has already denied. Peterson cannot use a motion in limine as a tool to re-urge a failed motion for summary judgment. As found by the Court in *City of Tulsa v. Tyson, et al.*, 258 F.Supp.2d 1263, 1300 (N.D.Okla. 2003)(vacated in connection of settlement), the State need not prove the portion or quantity of harm caused by each Defendant, but only must show that each Defendant, such as Peterson, contributed to phosphorus or bacteria loading to the IRW and that the loading results in harm sustained by the State. The State's evidence certainly meets that standard. The Court has ruled triable issues of material fact exist. The State must prove that bacteria and phosphorus from the waste of each of the Defendants' birds makes its way into the water. This can be proven by circumstantial evidence. Common sense and the laws of physics cannot be ignored regarding the volume of poultry waste in this watershed, and the propensity for water carrying constituents of poultry waste from land applied fields to flow down hill. Waste from Peterson's birds is not treated differently in the environment than the waste of any other Defendants' birds. Hundreds of thousands of tons of poultry waste are generated in the IRW. Peterson's contribution to that volume of waste is significant. *See* Ex. E (Fisher Expert Report at 24, Table 6).

It is undisputed that poultry waste contains disease causing bacteria. (Poultry Water Quality Handbook. Dkt 2077-2, Exhibit 56 to Dkt# 2062); (*See* Teaf Affidavit Dkt #1373-7 at ¶17); *See* Ex. A (Houtchens Depo at 64); *See* Ex. A (Mullikin Depo at 71).

Dr. Chris Teaf ("Dr. Teaf") offers reliable expert opinion as to the link between bacteria in poultry litter and the waters of the IRW. The manner in which the Oklahoma DEQ, and essentially all other U.S. environmental and public health agencies (and internationally as well), assess the potential for contamination of surface water bodies by "pathogens" is by means of the "indicator organism" paradigm. *See* Ex. F (Teaf Report, May 2008, paragraph 21). This is not an approach or terminology developed by the State, it is the standard practice. Primary Body Contact Recreation (PBCR) is an exposure category defined by the State of Oklahoma Administrative Code in Title 785, Chapter 45 (OAC, 2007).

In water bodies that are governed by the PBCR requirements, the State of Oklahoma mandates that such water "shall not contain chemical, physical or biological substances in concentrations that are irritating to skin or sense organs or are toxic or cause illness upon ingestion by human beings" (OAC, 2007). Clearly, levels of bacteria and indicator organisms that exceed health-based criteria and other standards will and do pose such an unacceptable health risk to users of the Illinois River and its tributaries *See* Ex. F (Teaf Report, May 2008, paragraph 24).

It is well established in the scientific and regulatory literature that "indicator organisms" *See* Ex. F (Teaf Report, May 2008, paragraph 21), while not necessarily pathogenic, can be so. Poultry waste commonly contains many bacteria of health interest, including E. coli, Salmonella, Staphylococcus, and Enterococcus *See* Ex. F (Teaf Report, May 2008, paragraph 36). Both E. coli and Enterococcus have value as more general indicator organisms and both have pathogenic species in the genus. Thus, Peterson is misleading in their dismissal of the indicator organisms group. The Edge-of-Field results cited by Peterson contains E. coli, Salmonella, and

Enterococcus, as well as very high levels of fecal coliforms. To respond specifically to Peterson's point regarding enterococci, one of the reasons that enterococci are among the suite of indicator organisms is that they can and do cause a variety of significant human disease in clinical settings. "Infections commonly caused by enterococci include urinary tract infections, endocarditis, bacteremia, catheter-related infections, wound infections, and intra-abdominal and pelvic infections" (Fraser et al., 2008)[2]. Pascual et al. (1990) demonstrated three cases of spontaneous peritonitis caused by Enterococcus species.[3] Higashide et al. (2005) described an Enterococcus species as a "pathogen of human infectious disease" in the case of endophthalmitis (eye infection) developed by a gardener.[4] It also has been illustrated that their keen ability to acquire resistance makes it difficult to treat the most severe infections caused by enterococci (Moellering, 1992).[5] This latter study is of particular interest in the context of antibiotic-resistant infections associated with the prophylactic use of antibiotics in the poultry industry. *See* Ex. F (Teaf Report, May 2008 paragraphs 33-34).

The Total Maximum Daily Load (TMDL) process, as it is conducted for "pathogens" and for other chemicals, is an activity in which every state participates, in concert with USEPA. That

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[2] Fraser, S. et al. 2008. Enterococcal infections. Emedicine from WebMD. http://emedicine.medscape.com/article/216993-overview.

[3] Pascual, J. et al. 1990. Spontaneous peritonitis caused by *Enterococcus faecium*. J. Clin. Microbiol. 28(6):1484-1486.

[4] Higashide, T. et al. 2005. Endophthalmitis caused by *Enterococcus mundtii*. J. Clin. Microbiol. 43(3):1475-1476.

[5] Moellering, R. 1992. Emergence of Enterococcus as a significant pathogen. Clin. Infect. Dis. 14:1173-1178.

process is a stepwise undertaking that evaluates potential sources of contaminants, assesses the relative importance of those contaminants, and seeks to establish goals that must be met by the contaminant sources in order to preserve or to improve water quality. For the IRW, the source assessment component of a TMDL approach was conducted, identifying poultry waste as a principal source of bacterial pathogen contamination *See* Ex. F (Teaf Report, May 2008, paragraphs 31-32). A recent example (July 2009) of a "pathogen" TMDL evaluation from Oklahoma illustrates the process, and explains how it is applied to bacterial water contamination. "An important part of TMDL analysis is the identification of individual sources of pollutants in the watershed that affect pathogen loading and the amount of loading contributed by each fo these sources." (*See* Availability of Draft Bacteria TMDL for the Salt Creek and Sand Creek Areas of the Upper Arkansas Sub-basin, July 14, 2009, Exhibit "G"). While in that example cattle are identified as a principal source, it points out the extremely limited contribution by some activities, and the major contribution by agricultural waste. In the IRW poultry waste and cattle waste are clearly the dominant contributors.

Peterson simply ignores that the standards used to assess the potential for contamination of surface water bodies by "pathogens" is by means of the "indicator organism" paradigm and can be identified through the TMDL process. Notwithstanding, the numerous samples analyzed by the State related to Peterson clearly reflect the presence of required indicator organisms. The test reports almost all tested high for total coliform many were high with the presence of the enterococcus group and *E. Coli* along with the presence of some salmonella in the spring sampling. Litter had extremely high values for many of these bacteria. All litter, surface soil (except LAL22), runoff (edge of field) and the spring had very high values of fecal coliform,

total coliform, e. coli and enterococcus (many values were reported greater than the upper limit) (Dkt No. [2397-9] Lab Reports).

As shown above, multiple methodologies exist to show the presence of pathogens in the waters of the State. The State has established pathogen levels in the IRW result from the enormous volumes of poultry waste, including that generated and contributed by Peterson's birds, being land applied within the watershed. Peterson's Motion should be denied in its entirety.

IX. COLLECTIVE REFERENCES TO DEFENDANTS' "WASTE" ARE APPROPRIATE

As previously stated, only the Cargill Defendants have joined in Peterson's Motion. However, Cargill has failed to allege any facts specific to Cargill in support of its Joinder and has not produced any contract alleging to transfer poultry waste to its growers therefore Cargill's Motion should be denied. To the extent Peterson's Motion seeks to exclude evidence on behalf of any other Defendant, it should be wholly disregarded. To the extent additional facts, argument and authority contained in section III above are pertinent they are incorporated herein.

Peterson attempts to avoid reference to its bird's waste based on conduct and contract. Pertinent to this motion are the undisputed facts that Peterson owns the bird's and the feed that goes in the birds. It is undisputed that Peterson by contract owned the poultry waste generated by its birds prior to March 1999 as no exculpatory language was present. Peterson (through Evans & Evans its affiliated company) changed its non-negotiable grower contracts in 1999 to provide that poultry litter shall be the property of the grower. The contract on its face reflects a revision occurred March 1999 (*See* PFIRW070275, filed under seal at Exhibit C).

Peterson Farms did not produce grower contracts, in discovery, prior to 1999 except for a 1997 Breeder contract (PFIRW-007046, Exhibit C filed under seal). This contract clearly does not contain the new waste transfer language contained in the 1999 version. It can be concluded not until 1999 did Peterson Farms contracts purport to transfer ownership of its bird's waste. Thus, as stated above Peterson admits it owned and thus had the authority to attempt its transfer to the grower in 1999.

In its argument, Peterson relies on testimony of Ray Wear regarding grower contract language however, Ray Wear, the Rule 30(b)(6) designee for Peterson's, stated conveniently he only looked at grower contracts back to 1999 (Wear Depo, Exhibit A at 48). According to Ray Wear it was around 1998 or 1999 that Evans & Evans acquired ownership of the Peterson's birds and began contracting with the growers on behalf of Peterson Farms. (Wear Depo, Exhibit A at 10-11, 13-14). Prior to that Peterson Farms, Inc. owned and contracted with the growers.

Coincidently, it should be noted, in 1998 that Ron Mullikin, past employee and director of environmental affairs, wrote a memo to management of Peterson Farms stating:

> *"I do feel, without any doubt, that as time passes, we the integrator will be found to be liable for it [litter] and the affect it has on our environment."* (PFIRWP-064066).

Peterson concedes prior to this contract language change growers were left to deal with the poultry waste produced by its birds. As further example of Peterson's continued control over the waste, Peterson did relax its barn clean out policy allowing growers to retain the litter in the barn longer than previously required. (Mullikin Depo, Exhibit A at 24:8-10).

It's important to note that the growers do not negotiate the terms of the Peterson contracts. They are allowed to "either sign it or not." *See* Ex. A (Wear Depo at 36-39, 56-57); *See* Ex. A (Deposition of Saunders taken October 23, 2006 at 162:13-15).

Peterson's insertion of a clause purporting to transfer ownership of the waste generated by it birds to escape the admitted liability of its use is ineffectual. Thus, before the contract change in 1999 a reference at trial to Peterson's waste is factually correct and appropriate. Since 1999, reference to Peterson's waste is still appropriate as set forth above and under the facts, argument and authority set forth in the State's Response in Opposition to Defendants' Dkt. No. [2395] Motion in Limine and the State's Response in Opposition to Defendants' Dkt No. [2430] Motion in Limine at Response Section II (§427B liability) both of which are incorporated herein.

Under §427B liability one who employs an independent contractor to do work which the employer knows or has reason to know to be likely to involve a trespass upon the land of another or the creation of a public or a private nuisance, is subject to liability for harm resulting to others from such trespass or nuisance. This is clearly the case with Peterson. Peterson even recognized this liability when it attempted to avoid its obligation through the insertion of non-negotiated terms in its grower contracts. Further, it is Peterson's waste that is being discarded because Defendant has placed or caused it to be placed in a location where they are likely to cause pollution of any air, land or waters of the state. 27A Okla. Stat. § 2-6-105(A).

CONCLUSION

For the reasons stated herein, Peterson's Motion should be denied in its entirety.

Respectfully Submitted,

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